87-1411

Supreme Court, U.S.
FILED
FEB 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

in the Supreme Court of the United States

October Term, 1988

NEW ENGLAND INSURANCE COMPANY,

Petitioner,

vs.

INTERNATIONAL BANK OF MIAMI, N.A.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

Guy B. Bailey, Jr.
Counsel of Record for Petitioner
Bailey, Dawes & Hunt,
a professional association
1390 Brickell Avenue
Miami, Florida 33131-3399
(305) 374-5505

February 22, 1988

QUESTION PRESENTED FOR REVIEW

WHETHER PETITIONER'S RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE ENTRY OF A JUDGMENT AFTER DEFAULT, WITHOUT NOTICE OR HEARING ON THE ISSUE OF DAMAGES.

PARTIES

Petitioner:

New England Insurance Company, Defendant in the trial court and Appellant in the Florida Third District Court of Appeal.

Respondent:

International Bank of Miami, N.A., Plaintiff in the trial court and Appellee in the Florida Third District Court of Appeal.

Additionally, the following were parties in the trial court but not in the appellate court, and are not affected by this proceeding:

(1) Laurans A. Mendelson, a director of International Bank of Miami, N.A. and defendant in the trial court.

(2) Frank Preve, Jr., former president of International Bank of Miami, N.A. and a defendant in the trial court.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW ...	i
PARTIES ...	ii
TABLE OF CONTENTS ...	iii
TABLE OF AUTHORITIES ...	iv, v
OPINION BELOW ...	1
STATEMENT OF GROUNDS FOR JURISDICTION ...	2
CONSTITUTIONAL PROVISION INVOLVED ...	3
STATEMENT OF CASE ...	4
ARGUMENT ...	7
APPENDIX ...	App. 1

TABLE OF AUTHORITIES

CASES	Pages
Boddie v. Connecticut, 401 U.S. 371 (1971)	10
Bowman v. Kings Land Development Company, 432 So.2d 660 (Fla. 5th DCA 1983)	7
Buffington v. Torcise, 504 So.2d 490 (Fla. 3d DCA 1987)	7
Calder v. McNess, 427 So.2d 393 (Fla. 4th DCA 1983)	7
Hammond Packing Co. v. State of Arkansas, 212 U.S. 322 (1909)	10, 12
Henry v. Mississippi, 379 U.S. 443 (1965)	11, 12
Hovey v. Elliott, 167 U.S. 409	12
Jenkins v. State, 385 So.2d 1356 (Fla. 1980)	2
Logan v. Zimmerman Brush Co., 455 U.S. 420 (1982)	9, 10
Mathews v. Eldridge, 424 U.S. 319 (1976)	8, 9

TABLE OF AUTHORITIES (Continued)

CASES	Pages
New England Insurance Company v. International Bank of Miami, N.A., 514 So.2d 390 (Fla. 3d DCA 1987)	1, 6
North American Accident Insurance Co. v. Moreland, 60 Fla. 153, 53 So. 635 (1910)	8
North Georgia Finishing, Inc. v. DiChem, Inc., 419 U.S. 601 (1971)	9
Overseas Development, Inc. v. Dominion Mortgage Corp., 330 So.2d 845 (Fla. 3d DCA 1976)	8
Palmore v. Sidoti, 466 U.S. 429 (1984)	2
Staub v. City of Baxley, 355 U.S. 313 (1958)	11
Wright v. Georgia, 373 U.S. 284 (1963)	11
OTHER AUTHORITIES	
U.S. Const. amend XIV	3, 7, 13
Rule 1.440(e), Fla. R. Civ. P.	7

OPINION BELOW

The opinion below is reported: *New England Insurance Company vs. International Bank of Miami, N.A.*, 514 So.2d 390 (Fla. 3d DCA 1987). [App. 3]

STATEMENT OF GROUNDS FOR JURISDICTION

On October 6, 1987, the Third District Court of Appeal of Florida affirmed the trial court's "Amended Order Denying New England Insurance Company's Motion for Relief from Final Judgment and to Vacate Default," refusing to set aside a final default judgment against Petitioner. [App. 1, 3] The appellate court denied rehearing on November 23, 1987. [App. 5]

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3) (1982). This is a final judgment or decree by the highest court in Florida in which a decision could be had. The Third District Court of Appeal affirmed, without opinion, 514 So.2d 390 (Fla. 3d DCA 1987), eliminating the Florida Supreme Court's jurisdiction to review the case. *See* Fla. Const. Art. V, § 3(b)(3); *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980). This Court has granted certiorari to review federal questions in similar circumstances. *Palmore v. Sidoti*, 466 U.S. 429, 431 (1984).

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

The due process clause of U.S. Const. amend XIV provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The Florida trial court violated Petitioner's due process rights by entering a judgment of $4,600,000 on a default with no notice or hearing or evidence whatever on the issue of damages.

Respondent, International Bank of Miami ("IBM"), sued Petitioner, New England Insurance Company ("New England"), based on New England's liability policy issued to IBM. IBM claimed losses "in excess of $4,600,000" for the fraud, conversion, and negligent and dishonest acts of its former president, Frank Preve. [App. 6] IBM did not attach a copy of the New England policy to the complaint.

New England was served with process by the Florida Insurance Commissioner on July 13, 1984. New England did not respond because the summons and complaint were misfiled among documents from another, federal court proceeding in which New England was a party, which also arose out of Preve's misdeeds.[1]

Over a year after service of process, on August 12, 1985, IBM moved for entry of default against New England; the Clerk of the Eleventh Judicial Circuit of the State of Florida entered the default on the same day.[2]

---

[1]Extensive deposition testimony and documentary evidence filed with the trial court explained the handling of the file for the IBM claims arising from the Preve misconduct, and the circumstances that led to the misfiling.

[2]IBM served Preve with process on August 12, 1985. Preve did not respond and was defaulted on October 21, 1985.

Over eight months later, on April 30, 1986, IBM obtained a final judgment against New England and Preve for $4,600,000 plus attorneys' fees and costs. All this was done without notice to New England or hearing on the amount of damages. IBM filed no papers, sworn or otherwise, setting forth the amount of its damages. The only "proof" of damages was an allegation in the complaint that IBM had suffered losses "in excess of $4,600,000." There was no allegation or proof of the amount or terms of insurance coverage; in fact, the insurance policy was not even annexed to the complaint and was not part of the record before the trial court. [App. 6]

On September 19, 1986, the trial court then entered an amended final judgment against New England for the $4,600,000 and for costs. There was also no prior notice to New England or hearing before entry of the amended final judgment.

New England had no knowledge of the entry of judgment against it until September 26, 1986, when IBM sent a copy of the amended final judgment to New England, by certified mail.

New England moved for relief from final judgment and to vacate the default on November 18, 1986, setting forth grounds for vacating the default judgment. Among other things, New England argued (1) that IBM had already recovered $1,000,000 of its losses from another insurer; (2) that New England's policy (referred to in, but not attached to, the complaint) had a $3,000,000 limit as to claims arising from Preve's actions; and (3) that the policy did not cover the delinquent bank officer's actions.

The trial court heard argument on New England's motions for relief from final judgment and to vacate default. The trial court refused to set aside the default. And it refused to require a hearing regarding the amount of damages to be paid by New England. The trial court deemed the damages "liquidated" merely by reason of the prayer for relief in the complaint [App. 11-12], and entered an order denying New England's motion and amended motion for relief from final judgment and to vacate default.

On March 12, 1987, the trial court vacated its original order and entered an amended order to the same effect, *nunc pro tunc* as of February 23, 1987. New England appealed this order to the Florida Third District Court of Appeal on March 23, 1987.

The Florida Third District Court of Appeal affirmed the judgment of the trial court *per curiam*, without opinion. *New England Insurance Company v. International Bank of Miami, N.A.*, 514 So.2d 390 (Fla. 3d DCA 1987).

Petitioner moved for rehearing of this decision; rehearing was denied on November 23, 1987.

The federal due process argument was considered by both the trial court and appellate courts below, having been raised before the trial court in Petitioner's "Motion for Relief from Default and from Ex-Parte Judgments" and Petitioner's "Motion for Rehearing" from the Order denying its motions. Due process was also raised in Petitioner's Initial and Reply Briefs and in its Petition for Rehearing in the appellate court. The

record as a whole shows that Petitioner's federal claim was presented and considered in the state court.

ARGUMENT

Petitioner has been deprived of due process rights granted by U.S. Const. amend XIV, by the failure of the Florida courts to grant it a hearing on the amount of damages to be paid to IBM following a default. Petitioner was ordered to pay $4,600,000 without any hearing whatever on the amount of damages. This is clearly a due process violation, unsupported by any possible significant state interest.

1. The Purported Right to a Pre-Judgment Hearing on Liquidated Damages is Illusory

The Florida procedure applied in this case automatically deems damages "liquidated", i.e., set in stone and unchangeable, by the very fact that there was a default. Any right to a prejudgment hearing on damages under the Florida Rules was therefore illusory, by virtue of the very means by which the Florida procedure was applied.

Florida law holds that, "a defaulting party has a due process entitlement to notice and opportunity to be heard as to the presentation and evaluation of evidence necessary to a judicial determination for the amount of *unliquidated* damages." *Bowman v. Kings Land Development Company*, 432 So.2d 660, 663 (Fla. 5th DCA 1983) *See also Calder v. McNess*, 427 So.2d 393 (Fla. 4th DCA 1983); *Buffington v. Torcise*, 504 So.2d 490 (Fla. 3d DCA 1987); Rule 1.440(e), Fla. R. Civ. P.

However, Florida courts have also held that the amount of damages to be paid by the defaulting party cannot be contested, thereby completely denying due process rights to the defaulting party. *Overseas Development, Inc. v. Dominion Mortgage Corp.*, 330 So.2d 845, 847 (Fla. 3d DCA 1976); *North American Accident Insurance Co. v. Moreland*, 60 Fla. 153, 53 So. 635 (1910).

The holding of the Florida court, following Florida law, that a default judgment automatically transforms any and all damages into "liquidated damages" is completely off the mark and a clear violation of due process. Even though Florida law ostensibly allows a defaulting defendant a hearing on "unliquidated" damages, since damages are *automatically* deemed liquidated (in which case there is no hearing), the supposed right to hearing is sham and illusory.

The unconscionable result of this Florida rule is that whatever outrageous and overstated amount of damages a plaintiff may have chosen to claim in his complaint, automatically becomes the "liquidated" or unchangeable amount that must be paid by a defendant upon default. Such a procedure is anathema to the tenets of due process as set forth by this Court.

As stated in *Mathews v. Eldridge*, 424 U.S. 319 (1976):

> This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest.

* * *

> The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."

424 U.S. at 333.

The Court held in *North Georgia Finishing, Inc. v. DiChem, Inc.*, 419 U.S. 601, 606-608 (1971), that property cannot simply be seized or taken on the *ex parte* representation of *one* party to a dispute. The Georgia garnishment statute considered in *Di-Chem* allowed issuance of a writ of garnishment solely on the affidavit of the creditor or his attorney with no input from the debtor. Under the Georgia statute, the affidavit only needed to contain "conclusory allegations." 419 U.S. at 606. The writ was then issued automatically by the clerk of court. This Court held the statute unconstitutional on the grounds that such *ex parte* taking of property violates due process.

Petitioner's situation is analogous to that of the garnishee in *Di-Chem*. Under the Florida procedure, New England is about to be deprived of over $4,600,000 solely on the basis of the conclusory and unchallenged allegations of IBM in its complaint. Under this Court's holding in *Di-Chem*, such action clearly violates due process.

New England is entitled to a hearing on damages "at a meaningful time," post-default and prior to entry of judgment. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982). The state may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement.

As in *Logan*, the deprivation suffered by New England is "final" and irrevocable. The Florida rule automatically "liquidating" damages upon default, results in "[a] system or procedure that deprives persons of their claims in a random manner," a result specifically disapproved by the Court in its decision in *Logan*. 455 U.S. at 434.

2. There is No Significant Countervailing State Interest

This Court cannot allow state procedural rules to violate important federal rights. As stated by the Court in *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971):

> [D]ue process requires, at a minimum that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.

New England does not deny that states have an interest in enforcing default procedures. Nor does New England challenge here the entry of the default against it. *See Boddie v. Connecticut*, 401 U.S. 371 (1971); *Hammond Packing Co. v. State of Arkansas*, 212 U.S. 322 (1909). New England objects to the Florida court's refusal to allow it a hearing on damages once the default was a *fait accompli*.

Allowing a hearing on the issue of damages post-default could not and does not frustrate the State of Florida's interest in enforcing defaults. Federal due

process rights of Petitioner far outweigh any possible state interest in avoiding delay in disposition of cases in the state courts. Such minor state interest, if any, cannot and does not override the serious due process violation suffered by Petitioner and others similarly situated at the hands of the Florida courts. As stated in *Henry v. Mississippi*, 379 U.S. 443, 448-9 (1965), giving effect to a procedural rule "for its own sake 'would be to force resort to an arid ritual of meaningless form.' " 379 US. at 449, *citing Staub v. City of Baxley*, 355 U.S. 313 (1958); *Wright v. Georgia*, 373 U.S. 284 (1963).

More importantly, as the Court stated in *Henry:*

> [T]he question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question.
>
> * * *
>
> [A] litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights.

379 U.S. at 447-8.

As shown above, the State's interest here, in refusing to allow hearings on the issue of damages, is minimal, if any.

The Florida procedural rules operate to *punish* a defaulting defendant by automatically deeming his damages "liquidated" so that he cannot obtain a hearing on the issue of damages. A defaulting defendant is forced to pay whatever damages the plaintiff requested without any opportunity to show setoff, or to show that the amount is wrong or exaggerated. Where, as here, a party has been deprived of due process, as a punitive measure, due process is violated. *See Hovey v. Elliott*, 167 U.S. 409 (1897); *Hammond*, 212 U.S. at 397.

Due process requires that New England have notice and opportunity to present evidence on the issue of damages due the Respondent *before* the actual taking of its property. New England has been deprived of valuable property rights in the amount of $4,600,000 plus interest without notice and in violation of due process.

CONCLUSION

This Court should issue a writ of certiorari to correct the state court's violation of U.S. Const. amend XIV.

Respectfully submitted,

Guy B. Bailey, Jr.
BAILEY, DAWES & HUNT
a professional association
1390 Brickell Avenue
Penthouse
Miami, Florida 33131-3399
(305) 374-5505

February 22, 1988

Appendix

APPENDIX

	Page
Amended Order Denying New England Insurance Company's Motion for Relief from Final Judgment	App. 1
Order of Florida Third District Court of Appeal	App. 3
Order Denying Rehearing before the Florida Third District Court of Appeal	App. 5
Excerpts from IBM's Complaint	App. 6
Excerpts from Hearing before the Trial Court on Petitioner's Motion to Vacate Default Judgment	App. 9

[EXCERPTS FROM ORDER OF TRIAL COURT]

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 84-08521 CA 14

[Style Omitted]

AMENDED ORDER DENYING NEW ENGLAND INSURANCE COMPANY'S MOTION FOR RELIEF FROM FINAL JUDGMENT AND TO VACATE DEFAULT AND DENYING NEW ENGLAND'S AMENDED AND/OR RENEWED MOTION FOR RELIEF FROM FINAL JUDGMENT AND TO VACATE DEFAULT, AND STAYING ENFORCEMENT UPON FILING BOND

THIS CAUSE, having come before this Court on February 3, 1987, and February 12, 1987, on New England Insurance Company's Motions For Relief from Final Judgment and on New England's Amended and/or Renewed Motion for Relief from Final Judgment and to Vacate Default, and the Court having heard argument of counsel, having reviewed legal memoranda, having reviewed the record, including the depositions and related exhibits and an affidavit, and being otherwise fully advised in the premises, it is, upon consideration,

ORDERED AND ADJUDGED as follows:

1. The Court's Order of February 23, 1987, is vacated.

2. New England Insurance Company's *ore tenus* request for leave to file its February 3, 1987, Amended and/or Renewed Motion, etc., together with attachments, is granted; the Court has considered such filings in making its determination.

3. New England Insurance Company's Motion for Relief from Final Judgment and to Vacate Default and its Amended and/or Renewed Motion for Relief from Final Judgment and to Vacate Default, etc., are hereby denied.

* * *

5. This Amended Order shall be effective *nunc pro tunc* as of February 23, 1987.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 12 day of March, 1987.

RICHARD YALE FEDER
CIRCUIT COURT JUDGE

* * *

NEW ENGLAND INSURANCE COMPANY, Appellant,

v.

INTERNATIONAL BANK OF MIAMI, N.A., Appellee.

No. 87-706.

District Court of Appeal of Florida, Third District.

Oct. 6, 1987.

Rehearing Denied Nov. 23, 1987.

An Appeal of a non-final order from the Circuit Court of Dade County; Richard V. Feder, Judge.

Bailey, Dawes & Hunt and Mercedes C. Busto, Miami, for appellant.

Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey and John H. Schulte and David B. McCrea and W. Barry Blum, Miami, for appellee.

Before HUBBART and NESBITT and DANIEL S. PEARSON, JJ.

PER CURIAM.

Affirmed. *Shingleton v. Bussey*, 223 So.2d 713 (Fla. 1969); *North Am. Accident Ins. Co. v. Moreland*, 60 Fla. 153, 53 So. 635 (1910); *Bil-Jax, Inc. v. Williamson*, 497 So.2d 1350 (Fla. 4th DCA 1986); *Bowman v. Kingsland Dev., Inc.* 432 So.2d 660 (Fla. 5th DCA 1983); *Cricket Club, Inc. v. Basso*, 384 So.2d 908, 909 (Fla. 3d DCA 1980); *Kentucky Farm Bureau Mut. Ins. Co. v. Mills*, 367 So.2d 673 (Fla. 2d DCA), *cert. denied*, 376 So.2d 74 (Fla. 1979); *Overseas Dev., Inc. v. Dominion Mortgage Corp.*, 330 So.2d 845 (Fla. 3d DCA 1976), *cert. denied*, 342 So.2d 1103 (Fla. 1977); *Winter Park Arms, Inc. v. Akerman*, 199 So.2d 107 (Fla. 4th DCA 1967); *Confederation of Canada Life Ins. Co. v. Vega Y Arminan*, 135 So.2d 867 (Fla. 3d DCA 1961), *cert. denied with opinion*, 144 So.2d 805 (Fla. 1962).

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1987

MONDAY, NOVEMBER 23, 1987

CASE NO. 87-706

NEW ENGLAND INSURANCE COMPANY,

Appellant,

vs.

INTERNATIONAL BANK OF MIAMI, N.A.,

Appellee.

Upon consideration, appellant's motion for rehearing is hereby denied.

A True Copy
ATTEST:
LOUIS J. SPALLONE
Clerk District Court of
Appeal, Third District

By /s/ Evelyn A. Hillman
Deputy Clerk

cc: Mercedes C. Busto
John H. Schulte

/aeh

[EXCERPTS FROM COMPLAINT OF INTERNATIONAL BANK OF MIAMI, INC.]

[Style omitted]

AMENDED COMPLAINT

Plaintiff sues Defendants and in support thereof alleges as follows:

* * *

4. Defendant, Frank Preve, Jr. was President of the Bank at all times material.

* * *

6. At all times material hereto, the Defendant, New England Reinsurance Corporation, had in full force and effect a liability insurance policy, Number DO-300078, covering the officers and directors of the Bank, which was for the benefit and protection of the Bank.

* * *

COUNT IV

Fraud Against Frank Preve, Jr.

36. Plaintiff realleges the allegations of paragraphs 1 through 31 of this Complaint.

37. Commencing on or about August 1981, and continuing to February 1982, Mr. Frank Preve, Jr., former President of the Bank, without authority, dishonestly, fraudulently, and in gross and complete disregard for the welfare of the Bank, initiated, authorized and engaged in various improper transactions including unauthorized transfers of funds, extensions of credit above the Bank's legal lending limit, extensions of credit to persons without proper substantiating documents, extensions of credit beyond his authority, manipulation of the Bank's records so that loans were not properly monitored or collected, and extensions of credit to persons with knowledge that those persons would never repay the Bank.

38. As a direct result of Mr. Preve's conversion and negligent and dishonest acts, the Bank has suffered losses and damages of more than $4,600,000 plus interest.

39. The Bank demanded that Mr. Preve repay the amounts illegally misappropriated and lost through his actions but he has refused to repay the Bank.

* * *

COUNT VI

New England Reinsurance Corporation Policy

45. Plaintiff realleges the allegations of paragraphs 1 through 44 of this Complaint.

46. Defendant, New England Reinsurance Corporation is liable to the Bank for the losses claimed in Counts IV and V of this Complaint to the extent those losses resulted from the errors, omissions, acts and breaches of duty of the Defendant officers and directors, as covered by the aforesaid liability policy issued by New England Reinsurance Corporation.

WHEREFORE, Plaintiff, The International Bank of Miami, N.A., demands judgment as follows:

* * *

(c) For damages in the amount of $4,600,000.00 against Defendants named in Count IV, Count V and Count VI of this Complaint, jointly and severally, together with punitive damages and interest * * * .

FINLEY, KUMBLE, WAGNER,
HEINE, UNDERBERG,
MANLEY & CASEY
Attorneys for Plaintiff,
The International Bank
of Miami, N.A.
Suite 1000 Flagship Center
777 Brickell AVenue
Miami, Florida 33131
(305) 371-2600

By: /s/ Gregory P. Borgognoni
Gregory P. Borgogoni

[EXCERPTS FROM HEARING BEFORE TRIAL COURT]

IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 84-8521 CA

INTERNATIONAL BANK OF MIAMI, N.A.,

Plaintiff,

vs.

FRANK PREVE, JR., et al.,

Defendants.

Dade County Courthouse,
Miami, Florida
Tuesday, 9:35 a.m.

February 3, 1987

The above-entitled case came on for hearing before the Honorable RICHARD YALE FEDER, as Judge of the above-styled court at the Dade County Courthouse, Miami, Dade County, Florida, on the 3rd day of February, 1987, commencing at 9:35 a.m.

APPEARANCES:

JOHN H. SCHULTE, ESQ.
and DAVID McCREA, ESQ.
of the law offices of
Finley, Kumble, Wagner, Heine,
Underberg, Manley, Myerson & Casey
on behalf of the Plaintiff

GUY B. BAILEY, JR., ESQ.
of the law offices of
Bailey, Dawes & Hunt, P.A.
on behalf of the Defendants

ALSO PRESENT:

AARON PODHURST, ESQ.

(Thereupon the following proceedings were had:)

THE COURT: Would you state your appearances for the court reporter, please.

MR. BAILEY: May it please the Court, Guy Bailey with Bailey, Dawes & Hunt, counsel for New England Insurance Company, formerly known as New England Reinsurance Company.

With us also is Kevin Barber, who is a claims manager supervisor for that company.

* * *

MR. BAILEY: * * * The other issue, which we haven't heard any conversation about, is whether a judgment should be issued on that without giving any notice. It is clear there was no notice given. These are not liquidated damages. These are just damages alleged in the complaint. Liquidated damages are negotiable instruments or specific terms of the contract, not just the terms of the complaint. So there should have been, even if you didn't set the default aside here on the amount of damages, but I think under North Shore and the cases following it, that unless it partakes of something like deliberate thumbing of its nose at the Court, justice is this way. The guideline is you should set it aside.

THE COURT: Maybe this is the case where the appellate courts will give me some guidelines because I think counsel is correct that it is almost an ad hoc decision, depending upon how the appellate judges felt the morning they heard the appeal. I think there should be some guidelines, but from what I read in this case, I'm satisfied that there was neglect, but not excusable neglect.

* * *

As far as notice of default, I don't know that liquidated requires a note, a mortgage, a real estate contract. Liquidated means that the parties know what it is being sued for. It is not in question. It is not in dispute. The amount for which the directors and Preve were being held for was known, four point whatever million dollars.

MR. BAILEY: Judge, all we knew was what the claim was.

THE COURT: That was a specific liquidated amount. They weren't saying hold us harmless for whatever we get hit for. It was for 4.6 million. I feel that was liquidated. I don't feel notice was necessary.

Supreme Court, U.S.
FILED
MAR 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1411

in the

Supreme Court

of the

United States

OCTOBER TERM, 1987

NEW ENGLAND INSURANCE COMPANY,
Petitioner,

vs.

INTERNATIONAL BANK OF MIAMI, N.A.,
Respondent.

On Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

John H. Schulte
Counsel of Record
W. Barry Blum
TEW JORDEN & SCHULTE
701 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 371-2600

Counsel for Respondent,
The International Bank of Miami, N.A.

DESIGNATION OF CORPORATE RELATIONSHIPS

International Bancorp of Miami N.V.

International Bancorp of Miami, Inc.

Granvalour Holdings, S.A.

QUESTIONS PRESENTED

I.

WHETHER THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257(3) TO REVIEW A STATE COURT JUDGMENT WHEN, IN THE STATE COURT PROCEEDINGS, THE PETITIONER NEVER CITED OR REFERRED TO THE FEDERAL CONSTITUTIONAL PROVISION RELIED UPON TO INVOKE THIS COURT'S CERTIORARI JURISDICTION

II.

WHETHER A DEFENDANT WHO ADMITTEDLY IS SERVED WITH PROCESS IN A STATE COURT PROCEEDING, BUT FAILS OR REFUSES TO DEFEND, MAY ARGUE THAT A DEFAULT JUDGMENT ENTERED AGAINST IT VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

TABLE OF CONTENTS

	Page
DESIGNATION OF CORPORATE RELATIONSHIPS	(i)
QUESTIONS PRESENTED	(ii)
TABLE OF AUTHORITIES	(iv)
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THIS COURT HAS NO JURISDICTION OVER THIS CASE BECAUSE PETITIONER FAILED TO RAISE OR PRESERVE A FEDERAL DUE PROCESS CLAIM IN THE STATE COURT PROCEEDINGS	4
II. PETITIONER WAS AFFORDED THE NOTICE AND OPPORTUNITY TO DEFEND CONTEMPLATED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT	7
III. THE ISSUE PRESENTED BY PETITIONER INVOLVES ONLY STATE LAW, AND THE FLORIDA COURTS CORRECTLY APPLIED THAT LAW	8
CONCLUSION	11

TABLE OF AUTHORITIES

Cases

	Page
Boddie v. Connecticut, 401 U.S. 371 (1971)	7, 8
Bowman v. Kingsland Development, Inc., 432 So.2d 660 (Fla. Dist. Ct. App. 1983)	5, 9
Calder v. McNess, 427 So.2d 393 (Fla. Dist. Ct. App. 1983)	10
Cardinale v. Louisiana, 394 U.S. 437 (1969)	4
Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)	7
Coleman v. Alabama, 399 U.S. 1 (1970)	10
In re The Florida Bar: Rules of Civil Procedure, 339 So.2d 626 (Fla. 1976)	9
In re The Florida Bar: Rules of Civil Procedure, 265 So.2d 21 (Fla. 1972)	9
Kingsley International Pictures Corp. v. Regents of the University of New York, 360 U.S. 684 (1959)	10
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)	7
National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964)	7
New England Insurance Co. v. International Bank of Miami, N.A., 514 So.2d 390 (Fla. Dist. Ct. App. 1987)	3, 7

TABLE OF AUTHORITIES (Continued)

Cases

	Page
New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928)	6
Oxley Stave Co. v. Butler County, 166 U.S. 648 (1897)	6
Peralta v. Heights Medical Center, Inc., 56 U.S.L.W. 4189 (U.S. Feb. 24, 1988)	8
Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969)	1, 9, 10
Stevenson v. Arnold, 250 So.2d 270 (Fla. 1971)	9
Street v. New York, 394 U.S. 576 (1969)	7
Tallman Pools of Georgia, Inc. v. Wood, 399 So.2d 112 (Fla. Dist. Ct. App. 1981)	10
VanBibber v. Hartford Accident & Indemnity Co., 439 So.2d 880 (Fla. 1983)	1-2
Webb v. Webb, 451 U.S. 493 (1981)	4, 5-6, 6-7

Constitutional Provisions

U.S. Const. art. IV, § 1	5
U.S. Const. amend. XIV	(ii), 3, 5, 6, 7
Fla. Const. art. I, § 9	6

TABLE OF AUTHORITIES (Continued)

Statutes and Rules

	Page
28 U.S.C. § 1257(3) (1970)	(ii)
Fla. Stat. § 672.7262 (1987)	1
Fla. R. Civ. P. 1.080(a)	9
Fla. R. Civ. P. 1.440(c)	5, 9
Fla. R. Civ. P. 1.540(b)	3
Fla. R. Civ. P. 1.540(b)(1)	3
Fla. R. Civ. P. 1.540(b)(3)	3

STATEMENT OF THE CASE

Petitioner New England Insurance Company ("New England Insurance") issued a directors and officers liability insurance policy (the "Policy") insuring the directors and officers of respondent The International Bank of Miami, N.A. ("International Bank"). The Policy required New England Insurance to pay

> any amount which the insureds are legally obligated to pay for a claim or claims made against them for Wrongful Acts and shall include but not be limited to damages, judgments, settlements and costs . . . and defense of legal actions, claims or proceedings and appeals therefrom.

International Bank brought suit in the Circuit Court for the Eleventh Judicial Circuit of Florida, in and for Dade County, and obtained a judgment for $4.6 million against the bank's former president, Frank Preve, Jr. ("Preve"), an insured under the Policy.

International Bank's complaint included a direct action against New England Insurance under the doctrine established in *Shingleton v. Bussey,* 223 So.2d 713 (Fla. 1969). *Shingleton* and its progeny hold that, under the public policy of Florida, an injured party is a third-party beneficiary of a liability insurance policy and may bring a direct cause of action against the insurer in a suit against the insured.[1]

---

[1]Fla. Stat. § 627.7262 (1987), enacted in 1982, provides that a judgment against the insured is a condition precedent to a direct action against an insurer. However, causes of action accruing prior to October 1, 1982, as International Bank's did, are still governed by

New England Insurance was properly served with process in July 1984, but failed or refused to respond. The notice of service of process, the summons and the complaint were received by the chairman of New England Insurance, who forwarded it to a senior vice-president, the director of New England Insurance's claims department. The senior vice-president wrote on the process the word "New", the date, "7-18-84", and the name "Bill".

"Bill" was William P. Hutt, a senior claims supervisor, who wrote on the process the word "Priority" and underlined it twice. At New England Insurance, documents labeled "Priority" required a response before the summons and complaint were sent to clerical personnel for filing.[2]

Despite all of the foregoing, New England Insurance failed, or refused, to file or serve any paper in the action. A default was entered and, on April 30, 1986, a final judgment was entered against both Preve and New England Insurance in the amount of $4.6 million. The final judgment was amended on September 19, 1986, and the amended final judgment was received by New England Insurance on September 26, 1986.

New England Insurance did not appeal from the amended final judgment. Instead, on November 19, 1986, New England Insurance served in the Florida trial court a motion for relief from final judgment and to vacate

---

Shingleton. See VanBibber v. Hartford Accident & Indem. Co., 439 So.2d 880 (Fla. 1983).

[2]Additionally, both prior to and after New England Insurance was served with process, it was notified of the action by four different law firms. It received from the law firms several copies of the complaint naming it as a defendant, as well as a copy of the entire court file.

default under Florida Rule of Civil Procedure 1.540(b)(1) and (3). After several evidentiary hearings, the trial judge determined that New England Insurance was not entitled to relief and denied the motion. New England Insurance then filed a motion for rehearing which, after a hearing, also was denied.

New England Insurance appealed the trial court's order denying its Rule 1.540(b) motion to the District Court of Appeal of Florida, Third District. In neither the trial court nor the court of appeal did New England Insurance argue that the Florida procedure regarding defaults and default judgments violates the due process clause of the fourteenth amendment to the United States Constitution.

Following briefing and oral argument, the court of appeal affirmed the trial court's ruling. *New England Ins. Co. v. International Bank of Miami, N.A.*, 514 So.2d 390 (Fla. Dist. Ct. App. 1987). It was only after the court of appeal's decision that petitioner, having failed in its state law arguments, developed the federal due process argument presented in its petition for writ of certiorari.

SUMMARY OF ARGUMENT

This Court has no jurisdiction to grant a writ of certiorari because petitioner never raised, presented or preserved below the federal claim put forth as the basis for certiorari. Petitioner never once cited the fourteenth amendment in the state court proceedings. The Florida court of appeal's opinion did not pass upon a federal due process question. Petitioner's arguments below were based entirely upon state law procedural and factual claims. Because no federal claim was presented or pre-

served below, this Court is without jurisdiction over this case.

Moreover, petitioner was afforded due process. Petitioner admittedly was served with process, but failed or refused to appear in the case and defend. It cannot now argue that its own failure or refusal to respond to the notice and opportunity to be heard was somehow a denial of due process.

Finally, the issue petitioner brings to this Court is purely a state law question. The Florida courts correctly determined that, under Florida law, the damages against petitioner were liquidated and petitioner was not entitled to additional notice of a hearing on damages. Petitioner improperly asks this Court to review that issue of state law.

ARGUMENT

I. THIS COURT HAS NO JURISDICTION OVER THIS CASE BECAUSE PETITIONER FAILED TO RAISE OR PRESERVE A FEDERAL DUE PROCESS CLAIM IN THE STATE COURT PROCEEDINGS

This Court consistently holds that it will not decide federal constitutional issues that were not raised, preserved or ruled upon in the state court proceedings below. *Webb v. Webb,* 451 U.S. 493, 498-99 (1981); *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969). In this case, petitioner never raised in the state courts any claim based upon the fourteenth amendment to the United States Constitution. This Court thus should deny the petition for writ of certiorari for want of jurisdiction.

Petitioner's assertion that "[t]he record as a whole shows that Petitioner's federal claim was presented and

considered in the state court" (Petition at 6-7) is incorrect. In all the papers petitioner filed below attacking the judgment entered against it,[3] petitioner never once cited or mentioned the fourteenth amendment, the United States Constitution, or a decision of this Court. In fact, petitioner used the words "due process" in its papers only five times, and never in reference to the United States Constitution. Three of those five references were to a passage, quoted three different times, from a Florida case, *Bowman v. Kingsland Development, Inc.*, 432 So.2d 660, 663 (Fla. Dist. Ct. App. 1983), that does not involve the fourteenth amendment, but rather Florida Rule of Civil Procedure 1.440(c).

In *Webb v. Webb*, 451 U.S. 493 (1981), petitioner sought certiorari by attempting to raise a federal claim under the full faith and credit clause, U.S. Const. art. IV, § 1. *Id.* at 494. The petition alleged that the federal question had been raised properly in the state courts. This Court dismissed the petition explaining:

> Although petitioner did use the phrase "full faith and credit" at several points in the proceedings below, nowhere did she cite to the Federal Constitution or to any cases relying on the Full Faith and Credit Clause of the Federal Constitution. . . .

---

[3]The papers filed by petitioner were: (1) a verified motion for relief from final judgment and to vacate default; (2) a renewed and/or amended Rule 1.540(b) motion for relief, etc.; (3) a motion for rehearing on defendant's motion for relief from final judgment; (4) appellant's main brief; (5) appellant's reply brief; and (6) a petition for rehearing.

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. *New York ex. rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1897). Petitioner argues that since the Georgia Constitution has no full faith and credit clause, there can be no doubt that the above references in the record were to the Federal Constitution and therefore that her federal claim was properly presented. . . . We are unpersuaded. In fact, we find it far more likely that petitioner was referring to state law.

451 U.S. at 496-97.

Similarly, in the instant case, petitioner's occasional and incidental uses of the term "due process", with no reference ever to the United States Constitution or any case relying on the fourteenth amendment, make it clear that no federal claim was adequately presented below.[4]

The Court in *Webb* also observed that "nowhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon." *Id.* at 495. In such circumstances, this Court assumes "that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court

---

[4]The Florida state constitution *does* have a due process clause, Fla. Const. art. I, § 9, which was a possible basis of petitioner's "due process" references.

can affirmatively show the contrary." *Id.* (quoting *Street v. New York*, 394 U.S. 576, 582 (1969)).

In this case, the Florida court of appeal's opinion does not pass upon any federal due process issue and no case cited by the court of appeal involves a federal due process claim. 514 So.2d 390.

No federal claim having been presented or preserved below, either expressly or by clear implication, this Court must deny the petition for writ of certiorari.

II. PETITIONER WAS AFFORDED THE NOTICE AND OPPORTUNITY TO DEFEND CONTEMPLATED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Due process requires that a party be afforded "notice and opportunity for a hearing". *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). It does not require that a defaulting defendant actually seize upon that opportunity. *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). If a defendant is served with process and has notice of a lawsuit against it, as New England Insurance admittedly did here (Petition at 4), but fails or refuses to defend, it cannot be heard to complain that it was denied due process. *Id.; cf. National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315 (1964) ("Since the [defendants] did in fact receive complete and timely notice of the lawsuit pending against them, no due process claim has been made").

As this Court stated in *Boddie:*

> Due process does not, of course, require that the defendant in every civil case actually have a hearing

> on the merits. A State can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance
> . . . .

401 U.S. at 378.

Here, New England Insurance was afforded notice and opportunity for a hearing consistent with due process requirements. It was served with process, and several senior officers in its claims department reviewed and discussed the process. New England Insurance failed to respond. This is not a case where property was seized or a judgment entered without prior notice. *See, e.g., Peralta v. Heights Medical Center, Inc.*, 56 U.S.L.W. 4189 (U.S. Feb 24, 1988).

Because New England Insurance was validly served with process, there was no denial of due process by the entry of the default judgment. Moreover, petitioner was afforded and participated in three hearings in the trial court, as well as a full hearing before the district court of appeal. Its belated effort to elevate to constitutional status its disagreement with the Florida courts' interpretations of Florida law is misguided. The petition for writ of certiorari should be denied. *Boddie*, 371 U.S. at 378.

III. THE ISSUE PRESENTED BY PETITIONER INVOLVES ONLY STATE LAW, AND THE FLORIDA COURTS CORRECTLY APPLIED THAT LAW

Petitioner's claim of entitlement to notice of a hearing on damages is purely a matter of Florida state procedure. Historically, a defaulted defendant in Florida had no right to any notice of a hearing on damages, even when the damages were unliquidated. *Stevenson v. Arnold*, 250

So.2d 270, 271-72 (Fla. 1971). Effective January 1, 1977, however, Florida Rule of Civil Procedure 1.440(c) was amended to require that "[i]n actions in which the damages are not liquidated, the order setting an action for trial shall be served on parties who are in default in accordance with Rule 1.080(a)." *Compare In re The Fla. Bar: Rules of Civil Procedure,* 339 So.2d 626, 629 (Fla. 1976) *and In re The Fla. Bar: Rules of Civil Procedure,* 265 So.2d 21, 40 (Fla. 1972). In reality, the issue presented in the petition for certiorari is whether the Florida courts properly interpreted Florida Rule of Civil Procedure 1.440(c).

In this case, the courts below correctly determined that, under Florida law, the damages awarded against New England Insurance were liquidated and that petitioner, being in default, was not entitled to notice of a hearing on damages. Under Florida law, damages are liquidated when the amount may be ascertained with exactness from the cause of action as pleaded. *Bowman v. Kingsland Dev., Inc.,* 432 So.2d 660 (Fla. Dist. Ct. App. 1983).

International Bank's cause of action against New England Insurance was a direct action founded upon *Shingleton v. Bussey,* 223 So.2d 713 (Fla. 1969). International Bank, as a third-party beneficiary of the Policy under Florida law, was entitled to recover from New England Insurance the amount of any judgment entered in International Bank's favor and against one of New England Insurance's insureds. International Bank secured a judgment against Preve, New England Insurance's insured, for $4.6 million and, under Florida law, was entitled to a judgment against New England Insurance for that same exact amount.

Petitioner's suggestion that there exists a Florida rule automatically "liquidating" damages upon default (Petition at 10) is absolutely incorrect. There is a plethora of Florida authority providing that when damages are unliquidated, Florida's rules of procedure require notice of a hearing on damages even though the defendant is in default. *See, e.g., Calder v. McNess,* 427 So.2d 393 (Fla. Dist. Ct. App. 1983); *Tallman Pools of Georgia, Inc. v. Wood,* 399 So.2d 112 (Fla. Dist. Ct. App. 1981).

Here, under a specific provision of Florida law, the direct action claim permitted by *Shingleton,* the damages against New England Insurance were liquidated by the judgment against its insured, Preve. It was the judgment against Preve, New England Insurance's insured, not New England Insurance's default, that "liquidated" International Bank's damages against New England Insurance.

The Florida court of appeal's reference to *Shingleton* demonstrates that its decision was founded upon that determination of Florida law. This Court, of course, must accept the state court's construction of controlling Florida law and its application to the state's default procedures. *Coleman v. Alabama,* 399 U.S. 1, 9 (1970); *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y.,* 360 U.S. 684, 688 (1959).

The instant petition does not present a viable federal due process issue. Rather, petitioner in effect asks this Court to review the state court's interpretation and application of Florida law and the Florida Rules of Civil

Procedure. That request is not a proper basis for certiorari review by this Court.

CONCLUSION

For the foregoing reasons, New England Insurance's petition for writ of certiorari to the District Court of Appeal of Florida, Third District, should be denied.

Respectfully submitted,

John H. Schulte
Counsel of Record
W. Barry Blum
TEW JORDEN & SCHULTE
701 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 371-2600

Counsel for Respondent,
The International Bank of Miami, N.A.

Supreme Court, U.S.
FILED
MAR 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1411

in the Supreme Court of the United States

October Term, 1987

NEW ENGLAND INSURANCE COMPANY,

Petitioner,

vs.

INTERNATIONAL BANK OF MIAMI, N.A.,

Respondent.

On Petition for Writ Of Certiorari To
the Third District Court of Appeal of Florida

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S OPPOSITION

Guy B. Bailey, Jr.
Counsel of Record for Petitioner
Bailey, Dawes & Hunt,
a professional association
1390 Brickell Avenue
Miami, Florida 33131-3399
(305) 374-5505

March 18, 1988

TABLE OF CONTENTS

	Page
Table of Citations	ii
Counterstatement of the Case	1
Argument	2
1. This Court has Jurisdiction to Review the Substantial Federal Questions Raised by Petitioner	2
2. Respondent Has Misinterpreted New England's Due Process Argument	6
3. The Issue Presented by Petitioner Involves Federal Law	6
CONCLUSION	9

TABLE OF CITATIONS

Citations	Page
Angel v. Bullington, 330 U.S. 183 (1947)	7
Bowman v. Kingsland Development, Inc., 432 So.2d 660 (Fla. 5th DCA 1983)	3, 4
Douglas v. State of Alabama, 380 U.S. 415 (1965)	4
Fuentes v. Shevin, 407 U.S. 67 (1972)	3
Goldberg v. Kelly, 397 U.S. 254 (1970)	3
Henry v. Mississippi, 379 U.S. 443 (1965)	5
Hovey v. Elliot, 167 U.S. 409 (1897)	8
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)	6
Mathews v. Eldridge, 424 U.S. 319 (1976)	3, 6, 8
North American Accident Insurance Co. v. Moreland, 60 Fla. 153, 53 So. 635 (1910)	7

TABLE OF CITATIONS—(Continued)

Citations	Page
North Georgia Finishing, Inc., v. Di-chem, Inc., 419 U.S. 601 (1975)	6, 7, 8
Overseas Development, Inc. v. Dominion Mortgage Corp., 330 So.2d 845 (Fla. 3d DCA 1976)	7
Peralta v. Heights Medical Center, 56 U.S.L.W. 4189 (Feb. 24, 1988)	8
Street v. New York, 394 U.S. 576 (1969)	4
Webb v. Webb, 451 U.S. 493 (1981)	3
OTHER AUTHORITIES	
U.S. Const. amend. XIV	2, 3, 4, 5, 9
Rule 1.440(c), Fla. R. Civ. P.	7

COUNTERSTATEMENT OF THE CASE

Petitioner, New England Insurance Company ("New England"), submits its Reply to both the facts and argument presented by Respondent, International Bank of Miami, N.A. ("IBM"), in its Brief in Opposition to New England's Petition for Writ of Certiorari, filed with this Court on February 22, 1988.

The Florida trial court violated Petitioner's due process rights by entering a judgment of $4,600,000 on a default with no notice or hearing or evidence whatever on the issue of damages.

New England takes issue with IBM's assertions regarding the factual background of this proceeding. A default judgment was entered against IBM because of the inadvertent misfiling of a document by a clerical employee, which caused New England not to respond to the complaint. IBM's suggestion that New England "refused" to file or serve an answer has no basis whatever.

IBM also refers to "several evidentiary hearings" on New England's motions to set aside the default judgment. To avoid confusion: While there were hearings before the trial court, New England was *not* granted a hearing for the determination of damages to be paid to IBM as a result of the default judgment. The trial court's failure to grant New England a hearing on the issue of damages, a clear denial of due process, is the only issue before this Court.

Finally, IBM is incorrect in its claims that New England failed to raise federal due process arguments below. In its Motion for Relief from Judgment and Petition for Rehearing in the trial court, New England stated specifically that it had been denied "notice and hearing" on the issue of damages and that therefore it was denied due process of law. [App.

5-9] Similarly, both New England's Initial and Reply Briefs before the Third District Court of Appeal specifically stated that the trial court's failure to allow notice and hearing on the issue of damages violated New England's due process rights. [App. 1-4]

In its Reply Brief, New England stated that, "[T]he basic premise of IBM's argument is that the absence of a defaulting insured from the proceedings obliterates a defaulting insurer's due process entitlement of notice and an opportunity to be heard on the issue of unliquidated damages." [App. 4] Similar arguments were raised in New England's Petition for Rehearing before the Florida appellate court.

New England has shown that it was deprived of due process rights under U.S. Const. amend. XIV, by the failure of the Florida courts to grant it a hearing on the amount of damages to be paid to IBM following a default.

ARGUMENT

1. This Court has Jurisdiction to Review the Substantial Federal Questions Raised by Petitioner

IBM claims that this Court has no jurisdiction of New England's Petition because New England did not raise federal constitutional arguments in the state court proceedings below. While New England did not specifically refer to the due process clause of U.S. Const. amend. XIV, in the trial and appellate proceedings below, New England's references to "notice and hearing" and "due process" were clearly intended to refer to federal as well as state due process issues and are sufficient to preserve a federal question for review. Reference to "due process" in legal parlance includes both state and federal claims. The fact that due process was referred to in New England's brief before the Florida

appellate court in a quote from *Bowman v. Kingsland Development, Inc.*, 432 So.2d 660, 663 (Fla. 5th DCA 1983), does not alter this fact. [*See* App. 2] The reference in *Bowman* is to general due process rights of Florida litigants and is not limited to Florida constitutional arguments.

This is quite a different situation from that in *Webb v. Webb*, 451 U.S. 493 (1981), cited by Respondent IBM. In *Webb*, although there were a number of references in Petitioner's pleadings below to "full faith and credit," this Court found no federal question because the record supported the conclusion that these references were to "a statutory full faith and credit requirement," not full faith and credit under the United States Constitution. 451 U.S. at 497.

Here, the opposite is true. New England's clear intention to raise federal constitutional arguments is obvious from the context of the pleadings and briefs where due process references appear. [App. 2, 4, 6-7, 9] Notice and hearing before taking of property, the concept discussed in *Bowman*, is the same argument raised in New England's brief before the appellate court, where it discussed the trial court's error in entering final judgment "without notice or hearing" on the issue of damages. [App. 1] This issue is at the very heart of a long line of due process cases decided by this Court under U.S. Const. amend. XIV. *See Mathews v. Eldridge*, 424 U.S. 319 (1976); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Fuentes v. Shevin*, 407 U.S. 67 (1972). Therefore, IBM is utterly wrong in its assertion that New England did not raise federal constitutional questions below.[1]

---

[1]IBM also argues that federal due process was not raised below because it is not specifically mentioned in the Florida appellate court's *per curiam* opinion. This is incorrect. Two decisions cited by the Florida court in its *per curiam* opinion deal with the matter of due process and the right of a defaulting party to a hearing on damages. *See* Bowman v. Kingsland

[FOOTNOTE CONTINUED ON NEXT PAGE]

The facts at hand fall under this Court's holding in *Street v. New York*, 394 U.S. 576, 584 (1969). As stated in *Street*:

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented. (Citations omitted).

Stating that it was denied "notice and hearing" on the issue of damages, in violation of its "due process" rights, New England showed by "clear intendment" its reliance on the rights granted by U.S. Const. amend. XIV—the rights to due process of law. *Id. See also Douglas v. State of Alabama*, 380 U.S. 415, 422 (1965) ("[A]n objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here").

Finally, the very nature of New England's complaint, regarding the due process effect of a state procedural rule,

---

(Footnote 1 Continued)

Development, Inc., 432 So.2d 660, 663 (Fla. 5th DCA 1983). ("A defaulting party has a due process entitlement to notice and opportunity to be heard as to the presentation and evaluation of evidence necessary to a judicial determination of the amount of unliquidated damages."); North American Accident Ins. Co. v. Moreland, 60 Fla. 153, 53 So. 635 (1910). Moreover, assuming Respondent's contentions were correct, the fact that Florida courts ignored New England's constitutional claims only makes it more compelling for this Court to review the matter.

raises a federal question for consideration by this Court. As stated in *Henry v. Mississippi,* 379 U.S. 433, 447-8 (1965):

> [T]he question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question.
>
> * * *
>
> [A] litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights.

The due process rights of Petitioner far outweigh any possible state interest in avoiding delay in disposition of cases in the state courts. The Florida procedural rules operate to punish a defaulting defendant by automatically deeming his damages "liquidated" so that he cannot obtain a hearing on the issue of damages. Where, as here, a party has been deprived of due process, as a punitive measure, due process is violated. *See Hovey v. Elliot,* 167 U.S. 409 (1897).

The record, as set forth in the attached Appendix, shows that New England has presented for this Court's consideration, a significant federal question under U.S. Const. amend. XIV. This Court clearly has jurisdiction to review New England's claim.

2. Respondent Has Misinterpreted New England's Due Process Argument

In addition to its baseless federal question arguments, and confusing the issues before this Court, IBM has completely misinterpreted New England's due process argument as set forth in its Petition for Certiorari. At pages 7 and 8 of its Brief in Opposition, IBM argues that New England was served with process and had notice of IBM's lawsuit against it. Therefore, IBM claims that New England has suffered no due process violations at the hands of the Florida courts.

But the question presented to this Court for consideration is whether New England was denied federal due process rights by the trial court's failure to allow New England notice or hearing *on the issue of damages after* entry of the default judgment and before the entry of final judgment.[2] As set forth in New England's Petition for Certiorari, such practice is an *ex parte* taking of property violative of due process. *See North Georgia Finishing, Inc., v. Di-chem, Inc.*, 419 U.S. 601, 606-608 (1975); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982). IBM has missed the point entirely and its arguments are both irrelevant and unavailing.

3. The Issue Presented by Petitioner Involves Federal Law

Respondent IBM claims that New England's entitlement to notice and hearing on the issue of damages before entry of judgment is purely a matter of Florida procedure and

---

[2]Thus, decisions cited by IBM regarding due process rights *before entry* of a default judgment are inapplicable to the facts at hand. *See* National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 315 (1964); Boddie v. Connecticut, 401 U.S. 371, 378 (1971).

Florida law. Specifically, IBM contends that the question before this Court is whether the Florida courts properly interpreted Rule 1.440(c), Fla. R. Civ. P. Such is not the case. New England has asked this Court to review the *application* of Rule 1.440(c) to a defaulting defendant by the Florida courts, which in fact deprives the defendant of its due process right to notice and hearing on the issue of damages.[3]

Although Florida courts have held that a defaulting party has a right to a hearing on "unliquidated damages," Florida courts have also held that the amount of damages to be paid by the defaulting party cannot be contested, thereby completely denying due process rights to the defaulting party. *Overseas Development, Inc. v. Dominion Mortgage Corp.*, 330 So.2d 845 (Fla. 3d DCA 1976); *North American Accident Insurance Co. v. Moreland*, 60 Fla. 153, 53 So. 635 (1910). [Cited in the Third District Court of Appeal's decision at 514 So.2d 390 (Fla. 3d DCA 1987).]

Thus, a default judgment automatically transforms any and all damages into "liquidated damages," a clear violation of due process. Even though Florida law ostensibly allows a defaulting defendant a hearing on "unliquidated" damages, since damages are automatically deemed liquidated (in which case there is no hearing), the supposed right to hearing is sham and illusory.

IBM further argues that New England's damages were deemed "liquidated" because Frank Preve, former President of IBM, also defaulted. IBM claims that, as insurer, New England is bound to pay for the loss caused by Preve's default and therefore has no right to a hearing on damages. This argument is absurd.

---

[3]*See* Angel v. Bullington, 330 U.S. 183 (1947) ("[W]hether the claims are based on a federal right or are merely of local concern is itself a federal question . . . When an asserted federal right is denied, the sufficiency of the grounds of denial is for this Court to decide").

New England had no notice that Preve had defaulted and had no opportunity to present arguments as to the damages against Preve. New England was sued directly as a defendant in the Florida trial court. As such, New England is entitled to a hearing on the damages assessed against it in a default judgment. *North Georgia Finishing*, 419 U.S. at 606-608; *Mathews v. Eldridge*, 424 U.S. at 333.

Due process requires that New England have notice and opportunity to present evidence on the issue of damages due the Respondent "at a meaningful time and in a meaningful manner" before the actual taking of its property. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *see also Peralta v. Heights Medical Center*, 56 U.S.L.W. 4189 (Feb. 24, 1988) (judicial sale of defaulting defendant's property, without notice or hearing, in order to satisfy a judgment, was violation of due process). New England has been deprived of valuable property rights in the amount of $4,600,000 plus interest without notice and in violation of due process.

CONCLUSION

This Court should issue a writ of certiorari to correct the state court's violation of U.S. Const. amend XIV.

Respectfully submitted,

Guy B. Bailey, Jr.
Bailey, Dawes & Hunt,
a professional association
1390 Brickell Avenue
Penthouse
Miami, Florida 33131-3399
(305) 374-5505

Appendix

APPENDIX INDEX

Page

EXCERPTS FROM BRIEF OF NEW ENGLAND INSURANCE COMPANY ..... App. 1

EXCERPTS FROM REPLY BRIEF OF NEW ENGLAND INSURANCE COMPANY ..... App. 3

EXCERPTS FROM TRIAL COURT MOTION OF NEW ENGLAND INSURANCE COMPANY ..... App. 5

EXCERPTS FROM TRIAL COURT MOTION FOR REHEARING OF NEW ENGLAND INSURANCE COMPANY ..... App. 8

[EXCERPTS FROM BRIEF
OF NEW ENGLAND INSURANCE COMPANY]

IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO. 87-706

NEW ENGLAND INSURANCE COMPANY,

Appellant,

-vs-

INTERNATIONAL BANK OF MIAMI, N.A.,

Appellee.

On Appeal From the Eleventh Judicial Circuit Court
In And For Dade County, Florida

APPELLANT'S MAIN BRIEF AND APPENDIX

* * *

A. The Trial Court Erred In Entering Final Judgment Without A Hearing On Damages.

The trial court entered Final Judgment and Amended Final Judgment, without notice or hearing. The court took no proof, but merely relied on the amount prayed for in the complaint.[23]

* * *

---

[23]The trial court expressed its view that, "[l]iquidated means that the parties know what it is [sic] being sued for." [2/3/87 transcript, A. 4009]

* * *

Under these circumstances, IBM's damages are unliquidated. *Bowman v. Kingsland Dev., Inc.*, 432 So.2d 660, 662 (Fla. 5th DCA 1983):

> Damages are liquidated when the proper amount to be awarded can be determined with exactness from the cause of action as pleaded, i.e., from a pleaded agreement between the parties, by an arithmetical calculation or by application of definite rules of law.

None of the foregoing rules apply in this case.

Moreover, IBM's prayer for relief could not have the effect of "liquidating" the damages sought in its complaint. Where the damages are unliquidated, not even an affidavit will serve to liquidate them. *See Harbour Tower Dev. Corp. v. Seaboard Equip. Co.*, 179 So.2d 405 (Fla. 3d DCA 1965) (default judgment based on affidavit of damages reversed where damages were unliquidated).

Under Florida law, when a claim involves unliquidated damages, "[a] defaulting party has a due process entitlement of notice and opportunity to be heard as to the presentation and evaluation of evidence necessary to a judicial determination of the amount of [those] damages." *Bowman, supra*, at 663; *Calder v. McNess*, 427 So.2d 393 (Fla. 4th DCA 1983); *Buffington v. Torcise*, ____ So.2d ____, 12 F.L.W. 849 (Fla. 3d DCA, March 24, 1987); Rule 1.440(c), Fla. R. Civ. P.

The trial court erred in denying New England this right.

The judgment should therefore be reversed.

* * *

[EXCERPTS FROM REPLY BRIEF
OF NEW ENGLAND INSURANCE COMPANY]

IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO. 87-706

NEW ENGLAND INSURANCE COMPANY,

Appellant,

-vs-

INTERNATIONAL BANK OF MIAMI, N.A.,

Appellee.

On Appeal From the Eleventh Judicial Circuit Court
In And For Dade County, Florida

APPELLANT'S REPLY BRIEF

* * *

The rule that a judgment against an insured is binding on the insurer applies to cases where the insurer has had notice of the proceedings against the insured and has an opportunity to defend. Here, New England had no notice that Preve had been served. Preve was served on August 12, 1985, over a year *after* service on New England, on the day IBM defaulted New England [A. 1249, 1250, 1251]. Preve was defaulted over two months later [A. 1255]. New England had no notice of Preve's default. Nor did New England have notice or an opportunity to defend against the ex-parte "determination" of $4.6 million in damages against Preve.

The cases IBM cites are therefore inapplicable here: *Atlantic Coast Dev. Corp. v. Napoleon Steel Contractors, Inc.*, 385 So.2d 676 (Fla. 3d DCA 1980) (third party defendant could not contest prior judgment against third-party plaintiff; third-party defendant had asked for and obtained a severance and did not appear at the trial of the main action to defend its interest); *Coblentz v. Amer. Surety Co. of New York*, 416 F.2d 1059 (5th Cir. 1969) (surety refused to handle insured's defense; insured consented to judgment; judgment conclusive on surety); *Alarm Systems of Fla., Inc. v. Singer*, 380 So.2d 1162 (Fla. 3d DCA 1980) (insurer's damages in a subrogation-type action were liquidated in the amount it had paid to insured).

Lastly, the basic premise of IBM's argument is that the absence of a defaulting insured from the proceedings obliterates a defaulting insured's due process entitlement of notice and an opportunity to be heard on the issue of unliquidated damages. This is not the law in Florida. *See* cases cited at Main Brief, page 39. [See App. 2]

Respectfully submitted,

BAILEY, DAWES & HUNT,
a professional association
Attorneys for Appellant
1390 Brickell Avenue
Miami, Florida 33131-3399
Telephone: (305) 374-5505

By: /s/ Guy B. Bailey, Jr.
Guy B. Bailey, Jr.
— and —
By: /s/ Mercedes C. Busto
Mercedes C. Busto

[EXCERPTS FROM TRIAL COURT MOTION OF NEW ENGLAND INSURANCE COMPANY]

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 84-08521 CA 14

THE INTERNATIONAL BANK OF MIAMI, N.A.,

Plaintiff,

vs.

FRANK PREVE, JR., et al.,

Defendants.

New England Insurance Company's Renewed And/Or Amended 1.540 (b) Motion For Relief From Default And From Ex-Parte Judgments Entered Thereon, Not Withstanding The Facts That: (a) The Default Arose From Excusable Neglect By New England Personnel Below Corporate Level; (b) The Default Was Not Sought For Over A Year Following Service; (c) The Complaint Served Sought To Recover For Intentional Actions Not Covered By New England's Policy [Count IV] And For Negligence By A Bank Director Not Yet Determined And Still Actively Being Defended; (d) The Complaint Sought Unliquidated Damages "In Excess of $4.6 Million" Yet No Notice Of Hearing On Damages Was Afforded; (e) The Judgment Was Amended, Again Ex-Parte; (f) The Complaint Failed To Allege Jurisdictional Nexis To New England's Activities And Failed To Annex New England's Policy; (g) New England's Policy Coverage Was Limited To $3,000,000, Yet The

Judgment Is For $4,600,00; And (h) Plaintiff Has Received Payment Or Partial Payment From Others For Which New England Is Being Given No Credit.

Florida Bar No. 096095

Defendant, New England Insurance Company, formerly known as New England Reinsurance Corporation ("New England"), respectfully submits its renewed and/or Amended Motion for Relief from Default and from Ex-Parte Judgments Entered Thereon and states:

* * *

No definite rules of law "are present for which the Court can assess damages, without the aid of evidence. Neither Count IV nor V of the Amended Complaint identify a concrete date of breach or loss." The Amended Complaint does not attach any documentation or evidence to allow this Court to make an arithmetical calculation. No contract exists setting forth a formula or an agreed amount. Without elaboration or explanation, Count IV claims that Preve claimed damages of "more than $4,600,000." Yet testimony is necessary to identify the losses, to determine when they occurred, and to substantiate the allegations that the amounts sued for were indeed the same sums alleged in Counts IV and V to have been misappropriated or improperly used. A value judgment must be on this testimony in order for the court to make a determination of the damages.

Even were it true that New England had no coverage or other defenses available due to the entry of the default, New England would not and could not be required to accept Plaintiff's allegations of the damages at face value.

> A defaulting party has a due process entitlement to notice and opportunity to be heard as to the presentation and evaluation of evidence necessary to a judicial determination of the amount of unliquidated damages.

432 So.2d at 663.

* * *

[EXCERPTS FROM TRIAL COURT MOTION FOR REHEARING OF NEW ENGLAND INSURANCE COMPANY]

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NO: 84-08521

Fla. Bar No. 378399

INTERNATIONAL BANK OF MIAMI, N.A.,

Plaintiff,

vs.

FRANK PREVE, JR., et al.

Defendants.

MOTION FOR REHEARING ON DEFENDANT'S MOTION FOR RELIEF FROM FINAL JUDGMENT AND TO VACATE DEFAULT

* * *

In the instant case, no definite rules of law are present to allow this Court to assess damages without the aid of evidence. Neither Count IV nor V of the Amended Complaint identify a concrete date of breach or loss. The Amended Complaint does not attach any documentation or evidence to allow this Court to make an arithmetical calculation. No contract exists setting forth a formula or an agreed amount. Testimony is necessary to identify the losses, to determine when they occurred, and to substantiate the allegations that the amounts sued for were indeed the same sums alleged in

Counts IV and V to have been misappropriated or improperly used. A value judgment must be placed on this testimony in order for the court to make a determination of the damages.

Even were it true that New England had no coverage or other defenses available due to the entry of the default, New England would not and could not be required to accept Plaintiff's allegations of the damages at face value.

> A defaulting party has a due process entitlement to notice and opportunity to be heard as to the presentation and evaluation of evidence necessary to a judicial determination of the amount of unliquidated damages.

432 So. 2d at 663.

* * *